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No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

KAPLAN TRUCKING COMPANY,
Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSONER OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

On February 15, 1956, the Tax Commissioner of Ohio levied an assessment against the petitioner based upon petitioner's use of the Ohio highways. Petitioner, being dissatisfied with the assessment, perfected an appeal. At every stage of the appeal the Tax Commissioner's assessment was affirmed.

The petitioner is a corporation organized under the laws of Ohio with its principal place of business in Cleveland, Ohio, and is a common carrier by motor vehicle conducting both interstate and intrastate operations (R. 19).

Kaplan Trucking Company has intrastate operating authority only in Ohio (R. 82). However, the company

maintains twenty-two terminals in the various states in which it is authorized to conduct interstate business, and it licenses its equipment in the state in which the equipment is maintained (R. 72). This out-of-state licensed equipment is used in operations into and through Ohio (R. 27).

Petitioner prepared and filed its Ohio highway use tax return based upon its use of Ohio highways during the audit period in question. However, petitioner refused to pay the tax contending that it had been denied the equal protection of the laws inasmuch as its competitors, residents of Michigan and Indiana, were not required to pay the tax by reason of the Ohio Supreme Court interpretation of certain reciprocity agreements in *Interstate Motor Freight System v. Bowers*, 164 Ohio St., 122, 128 N.E. 2d. 97.

During the period that the reciprocity agreements in question were in effect, the petitioner paid no Ohio taxes on its equipment which was licensed in Michigan or Indiana, and no Michigan or Indiana taxes on its Ohio-licensed equipment (R. 47-50).

ARGUMENT

I.

The Decision of the Ohio Supreme Court is Consistent with its own Prior Decisions and with the Decisions of this Court and no Substantial Unsettled Federal Question is here Presented.

The petitioner argues that the action of the Tax Commissioner of Ohio in levying a highway use tax assessment against it is unconstitutionally discriminatory in that competitors of petitioner are excused from this tax by reason of reciprocity agreements. Petitioner contends that it is a member of the same class as nonresidents engaged in motor transportation and that there is no basis for according it treatment unlike that granted nonresidents. The reciprocity agreements of 1937, which provided for waiver of highway fees and taxes, created two separate classifications. These agreements were entered by statutory authorization. They are therefore, in effect, acts of the legislature. Legislative bodies have historically been given wide latitude in problems of classification and the classification thus established has been upheld so long as not found to be arbitrary. *Interstate Busses Corp. v. Blodgett*, 276 U. S., 245, 48 S. Ct., 230, 72 L. Ed., 551; *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S., 285, 55 S. Ct., 709, 79 L. Ed., 1439; *Storaasli v. Minnesota*, 283 U. S., 57, 51 S. Ct., 354, 75 L. Ed., 839.

The Ohio Supreme Court at pages 564 and 565 of *State ex rel. Struble, v. Davis*, 132 Ohio St., 55[illegible] (noted):

> "There is no division of authority upon the proposition that in the matter of classification the legislature has a wide discretion, and that its action in that regard will not be set aside by the courts unless the

> classification attempted results in such discrimination against members *of the same class* as to deny them the equal protection of the laws. * * *" (Emphasis added.)

At page 537 of *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S., 527, 51 S. Ct., 540, 75 L. Ed., 1248, the following observation is made:

> "* * *. The Fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, * * * or if any state of facts reasonably can be conceived to sustain it. * * *"

It is submitted that a reasonable basis does exist for a difference in treatment between the petitioner and non-resident truckers. That basis is reciprocity. Agreements between states of the Union involving water rights, bridges, fishing privileges and taxation problems have been upheld. See 134 A. L. R., 1412 to 1424.

The case of *Atlantic & Danville Ry. Co. v. Hooker*, 194 Va., 496, 74 S. E. 2d, 270, involved the question of highway use taxation and reciprocity agreements. In concluding its opinion, the court stated at page 283 of the decision as reported in 74 S. E. 2d as follows:

> "In the application and administration of the Virginia reciprocity agreement, all Virginia interstate carriers, corporate and unincorporate, obtain *a substantial benefit in the free use of the roads of a foreign state in return for similar benefits granted carriers of the foreign state, a typical example of reciprocity.* Whether the benefit obtained by Virginia carriers is equal or superior to the benefits gained by foreign carriers is a question of fact. As to such fact, the record discloses that representatives and agents of Virginia motor carriers have testified, without contradiction, that reciprocity as applied in Virginia works

to the economic advantage of the commonwealth and its domestic carriers, corporate and unincorporate." (Emphasis added.)

The quoted language would seem to apply with substantial force to the instant problem.

In its potition Kaplan Trucking Company has stressed the case of *Wheeling Steel Corporation v. Glander*, 337 U. S., 562, 69 S. Ct., 1291, 93 L. Ed., 1544. It is urged by the petitioner that the *Wheeling Steel* decision is inconsistent with the decision in the instant case. We submit, however, that no such inconsistency exists. It is the position of the Tax Commissioner that the *Wheeling Steel* case is not dispositive of this appeal nor is the decision of the Ohio Supreme Court inconsistent with it. In the *Wheeling Steel* case the State of Ohio offered to fix reciprocally the situs of intangible property for taxation purposes. No sister state accepted this offer. Ohio had no control over the property in question. In the instant case we have a reciprocity agreement entered into concerning highways owned by the State of Ohio. Ohio, on the one hand, and Michigan and Indiana, on the other hand, had agreed reciprocally to forego the collection of specific taxes levied in connection with the use of the states' roads. The contracting states had each given up something of value in exchange for something else of value. Under the decision of *Interstate Motor Freight System v. Bowers*, 164 Ohio St., 122, 128 N.E. 2d, 97, the State of Ohio and the State of Michigan permitted free use of each other's highways. The same exchange was operative in the Indiana-Ohio situation.

The Ohio Supreme Court terminated its opinion as follows:

"After a study of the record and the authorities cited in the briefs of counsel, this court is of the view

that the classification in effect during the limited period here involved was not such as to warrant this court in holding it without reason under the particular circumstances. It was not unconstitutional, and the judgment of the Court of Appeals must be affirmed."

It is submitted that this conclusion is consonant with the pertinent decisions of this court and no substantial federal question is here presented.

II.

The Factual Conclusion of the Supreme Court of Ohio that Petitioner Paid no Ohio Tax on its Equipment Licensed in Michigan or Indiana is Fully Supported by the Record.

The petitioner alleges that the Supreme Court of Ohio made an incorrect factual determination. The attention of this court is invited to pages 47 to 50 of the record wherein counsel for the petitioner examined an official of Kaplan Trucking Company on the question of whether or not the company paid Ohio tax on its equipment which was licensed and maintained in Michigan and Indiana. The consistent answers of the witness resolve all doubt on the question.

While petitioner has approached the classification problem in its petition as if the question presented was one of residence alone, the evidence above referred to discloses that in practical operation the petitioner founded the classification not only on the basis of residence but also upon a characteristic of the vehicles. It seems to follow that if petitioner is correct in its interpretation that it did not owe Ohio taxes for equipment maintained and registered in either Michigan or Indiana, then its argument on

the basis of improper classification fails since, if it is correct, the basis for the classification was not solely the residence of the owner of the equipment in question, as petitioner has urged, but additionally the place of maintenance and registry of the vehicles.

III.

The Assessment of the Tax Commissioner is not so Discriminatory that it Denies Petitioner Equal Protection of the Laws.

Since it is felt that this problem has been amply discussed under heading numbered I, repetition of the argument and authorities there cited is deemed unnecessary. Suffice it to say that the Tax Commissioner's action was based upon a properly conceived classification and was consistent with the Ohio highway use tax statutes and in conformity with the pertinent decisions of the Ohio Supreme Court. Additionally, the Tax Commissioner's action was not violative of constitutional guarantees nor opposed to decisions of this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Attorneys for Respondent.